



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 11, 2003

Ms. Susan Camp Lee
Sheets & Crossfield, P.C.
309 East Main Street
Round Rock, Texas 78664-5246

OR2003-0934

Dear Ms. Lee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176280.

The City of Round Rock (the "city"), which you represent, received a request for the personnel files of two named officers and a copy of a sexual harassment complaint filed against them. You state that you have released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.111, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first note that some of the submitted information constitutes completed evaluations. Section 552.022(a) of the Government Code provides in pertinent part as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

You may withhold the completed evaluations only to the extent they are made confidential under other law or are otherwise protected by section 552.108 of the Government Code. You do not assert that the submitted information is excepted from disclosure under section 552.108. You claim that the evaluations are excepted from public disclosure pursuant to section 552.111. However, section 552.111 is a discretionary exception under

the Public Information Act (the "Act") and does not constitute "other law" for purposes of section 552.022. See Open Records Decision No. 473 (1987) (governmental body may waive section 552.111); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, you may not withhold the submitted evaluations under section 552.111.

We next address your claim that the submitted documents contain criminal history information that is protected by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by statute. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") must be withheld under section 552.101. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. See Gov't Code § 411.083. The definition of criminal history record information does not include driving record information. See Gov't Code § 411.082(2)(B). Based on our review of the submitted information, we are unable to identify any confidential CHRI in the submitted documents.

You also argue that some of the submitted information is excepted from release under section 552.101¹ as it consists of compiled CHRI the release of which is prohibited under common-law privacy. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (making individual's criminal history compiled by a governmental entity confidential as such compilation takes on a character that implicates the individual's right to privacy). The doctrine of common-law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, none of the submitted information consists of a compilation of any individual's criminal history as contemplated by *Reporters Committee*. Accordingly, you may not withhold any of the submitted information as CHRI under section 552.101.

Next, you argue that the information you bracketed in brown is excepted from disclosure under section 552.101 in conjunction with common-law privacy. This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. Open Records Decision Nos. 600 (1992)

¹Section 552.101 also encompasses information protected by common-law privacy.

(Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989) (credit reports, financial statements, and other personal financial information), 373 (1983) (assets and income source information); *see also* Open Records Decision No. 373 at 3 (beneficiaries have common-law right of privacy in their financial information.) However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Thus, information about the essential features of an employee's participation in a group insurance program funded in part by the state involves him in a transaction with the state and, therefore, is not excepted from disclosure by a right of privacy. On the other hand, information is excepted from disclosure if it relates to a voluntary investment that the employee made in an option benefits plan offered by the city. Open Records Decision No. 600 (1992). After carefully reviewing the information you have bracketed under section 552.101 in conjunction with common-law privacy, we find that the majority of this information is private. Some of the information you have bracketed, however, is not protected by common-law privacy. Thus, you must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy.

You assert that some of the submitted information consists of W-4 forms that are excepted from disclosure under section 552.101. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Our office has specifically held that W-4 Forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, you must withhold from disclosure the W-4 Forms we have marked.

You next assert that some of the submitted information is excepted from disclosure under section 552.117. Section 552.117(2) excepts from disclosure "information that relates to the home address, home telephone number, or social security number" of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, or that reveals whether the peace officer has family members. You state that the individuals whose information is at issue are peace officers as defined by article 2.12 of the Code of Criminal Procedure. Some of the information you have highlighted under this exception does not relate to the home address, home telephone number, or social security number of a peace officer or reveal whether the peace officer has family members. Therefore, you must withhold from disclosure the information we have marked under section 552.117(2) of the Government Code.

We note that another social security number in the submitted materials may be excepted from disclosure under section 552.101. A social security number is excepted from required public disclosure under section 552.101 of the Act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security number in the submitted information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that it was not obtained or is not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Next, you assert that the submitted information contains motor vehicle information subject to section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers that we have marked under section 552.130.

Finally, we note that the documents contain information made confidential under section 552.136. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code §552.136. We have marked the information that the city must withhold under section 552.136.

In summary, the city must withhold the W-4 forms we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. A social security number in the submitted information may be excepted under section 552.101 in conjunction with federal law. The city must withhold from disclosure the information we have marked under section 552.101 in conjunction with common-law privacy. We have marked information the city must withhold under section 552.117(2). The city must withhold the Texas driver's license numbers we have marked under section 552.130. Finally, the city must withhold the account numbers we have marked under section 552.136. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 176280

Enc: Submitted documents

c: Ms. Monica Polanco
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(w/o enclosures)